Supreme Court, U.S.
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No. 97-282

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BETH ANN FARAGHER,

Petitioner,

v.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employer may be held liable for a supervisor's "hostile environment" sexual harassment when the employer neither knew nor should have known of the harassment.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including numerous employment discrimination cases.[2]

This case concerns the circumstances under which an employer may be held liable for a supervisor's "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* Title VII covers virtually all employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Most of the Chamber's

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[1] The parties have consented to the filing of this brief. Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Burlington Indus., Inc. v. Ellerth*, No. 97-569; *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

members are therefore subject to Title VII and are potential defendants in sexual harassment cases.

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court held that Title VII creates a cause of action for sexual harassment, "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*." *Id.* at 65. Harassment that does not involve a quid pro quo is known as "hostile environment" harassment. *Id.* The *Meritor* Court held that "hostile environment" harassment is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'" *Id.* at 67 (citation omitted). Subsequently, the Court clarified that a "hostile environment" exists only if (1) the plaintiff subjectively perceives the environment to be abusive and (2) a reasonable person would agree. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Although both *Meritor* and *Harris* defined sexual harassment, neither case established a definitive rule regarding the circumstances under which an employer may be held liable for its employees' misconduct. The reason the law is unsettled is that Congress has created a cause of action against employers, but has failed to specify the standard of care to which employers are to be held. Petitioner and her *amici* have filed briefs urging the Court to fill this gap by adopting a series of overlapping, convoluted employer liability rules based on the *Restatement (Second) of Agency* (1958) (the "*Restatement*").

Although the *Meritor* Court instructed the lower courts that Congress intended the use of "agency principles" in sexual harassment cases, 477 U.S. at 72, it cautioned that those principles "may not be transferable in all their particulars." *Id.* The lower court in that case had applied a strict liability standard, ruling that "an employer is absolutely liable for

sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." *Id.* at 63. The Court rejected that standard, holding that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72. The Court declined, however, to issue definitive guidance as to when employers *are* liable for supervisory sexual harassment. As a result, the lower courts are in conflict regarding the appropriate standard to be applied.[3/]

Because the statute is silent on an employer liability standard and the *Restatement* does not adequately address the issue presented in this case, the Chamber urges the Court to resolve the conflict among the circuits by applying agency principles specially tailored to the objectives of Title VII. Under those principles, an employer should be held liable for

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[3/] *Compare, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (under negligence principles, "'liability exists where the [employer] knew or should have known of the harassment and failed to take prompt remedial action'") (quoting *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989)) *with Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.) (employer is strictly liable for hostile environment sexual harassment "if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship"), *cert. denied*, 512 U.S. 1213 (1994). For a circuit-by-circuit survey of the law, see Frederick J. Lewis and Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 Mem. St. U.L. Rev. 667 (1994).

hostile environment sexual harassment only if it knew or should have known of the harassment but failed to take prompt remedial action.

SUMMARY OF ARGUMENT

Neither Title VII nor the Court's precedents require that the *Restatement (Second) of Agency* be applied to determine whether an employer is liable for sexual harassment perpetrated by a supervisor. The *Restatement* is one source of common law agency principles, but it was not formulated to address issues such as supervisory sexual harassment. The common law rule that a master is liable for the torts of his servants committed while acting in the scope of their employment has little or no relevance, because sexual harassment is almost never within the scope of a supervisor's employment. For the same reason, a supervisor rarely has "actual authority" or "apparent authority" to commit sexual harassment. Moreover, as a practical matter, the *Restatement* rule imposing liability on a master whenever his servant is "aided in accomplishing [a] tort by the existence of the agency relation" is inconsistent with the Court's decision in *Meritor*, because the *Restatement* rule would in effect result in strict liability for supervisory sexual harassment.

Instead of relying on the *Restatement*, the Court should look to agency principles that comport with Congress's twin objectives of deterring sexual harassment and providing compensation to victims. Thus, an employer should be held responsible for a supervisor's hostile environment sexual harassment if and only if it knew or should have known of the harassment but failed to take prompt remedial action. This straightforward negligence standard comports with traditional principles of tort law, which generally impose liability only on a defendant that fails to exercise due care. Any decision to

impose liability on an employer that *does* exercise due care should be left to Congress — which has not spoken on this issue — because Congress is in the best position to balance the competing policy concerns inherent in such a departure from the normal rule.

ARGUMENT

I. THE *RESTATEMENT* DOES NOT PROVIDE AN APPROPRIATE MODEL FOR EVALUATING AN EMPLOYER'S LIABILITY FOR A SUPERVISOR'S HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Petitioner and her *amici* begin with the premise that the *Restatement* is directly applicable to sexual harassment cases. But neither the statutory text nor the Court's decision in *Meritor* supports that premise.

Title VII provides that an "employer" may not discriminate against any individual based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). And Title VII defines the term "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ." 42 U.S.C. § 2000e(b).

Citing this language, the Court stated in *Meritor* that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. Thus, the Court held, employers are not "always automatically liable" for sexual harassment committed by supervisors. *Id.* The Court added that agency principles should serve as "guidance" in determining whether an employer is liable, but noted that "such

principles may not be transferable in all their particulars to Title VII." *Id.* And the Court cited the *Restatement* as *one source* of common law agency principles. *Id.* But as the United States Court of Appeals for the First Circuit noted ten years ago:

> The gist of the Court's holding is not to be gleaned from strict adherence to agency principles, which, as the Court noted, were to be mere "guidance," but rather from its definitive refusal to find employers "always automatically liable."

Lipsett v. University of Puerto Rico, 864 F.2d 881, 900 (1st Cir. 1988) (quoting *Meritor*, 477 U.S. at 72).

More recently, Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit surveyed the post-*Meritor* case law and concluded:

> The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the *Restatement* to employers' liability for sexual harassment by supervisory employees. . . .
>
> It is time that we threw away the crutch of the *Restatement* and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter — as I think the Supreme Court invited us to do in *Meritor* when it (under)stated that the common law of agency might not be fully transferable to sexual harassment — what the best regime of liability would be for these cases.

Jansen v. Packaging Corp. of Am., 123 F.3d 490, 509-10 (7th Cir. 1997) (Posner, C.J., concurring and dissenting), *cert. granted sub nom. Burlington Indus., Inc. v. Ellerth*, No. 97-569 (Jan. 23, 1998).

A review of the provisions of the *Restatement* relied upon by the petitioner and her *amici* readily demonstrates the wisdom of Chief Judge Posner's belief that they should not be applied to supervisory sexual harassment. For example, some of petitioner's *amici* argue that sexual harassment victims may recover on the theory that a master "is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Restatement* § 219(1). (NELA Br. 9; AFL-CIO Br. 14-15.)[4] The court below aptly held, however, that "a supervisor's harassing conduct is typically outside the scope of his employment." (Pet. App. 9a.) An employee's conduct is within the scope of employment only if it is of the kind he is employed to perform, it occurs substantially within the authorized time and space limits of the employment, and the employee at least partially intends the conduct to serve the employer. *Restatement* § 228(1). Sexual harassment is not within the job description of any supervisor in any reputable business. *See, e.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987). And harassment against an employee could hardly be thought by a supervisor to help the employer's business. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986) (Posner, C.J., referring to

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[4] Petitioner mentions section 219(1) only in a footnote. (Pet. Br. 21 n.17.)

racial harassment). Consequently, because sexual harassment is almost never within the scope of a supervisor's employment, the courts regularly conclude that employer liability cannot be justified on this ground. *See, e.g., Andrade v. Mayfair Mgmt. Inc.*, 88 F.3d 258, 261-62 (4th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Hicks*, 833 F.2d at 1417-18.

One of petitioner's *amici* nevertheless cites section 231 of the *Restatement* for the proposition that the court of appeals' decision is "clearly wrong" because the "scope of employment" may encompass illegal acts. (NELA Br. 9.)[5] But the drafters made clear that this rule applies only to minor infractions, and not to "acts which are clearly inappropriate." *Restatement* § 231, comment *a*. Thus, NELA's argument does not serve the purposes for which it is intended, because the more egregious the harassment, the *less* likely it is to be found within the scope of employment.[6] If section 231 of the

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[5] Section 231 of the *Restatement* provides: "An act may be within the scope of employment although consciously criminal or tortious."

[6] The *Restatement* provides the following two examples:

> 1. A, P's chauffeur, to avoid a rough spot in the road while upon an errand for P, unlawfully drives upon the sidewalk. This conduct is within the scope of employment.
>
> 2. P employs A as a servant to dig a ditch in his land, near the road. Finding rock

Restatement governed sexual harassment cases, plaintiffs would be in the awkward position of attempting to minimize the degree of the transgression, while employers would be in the equally awkward posture of attempting to negate liability by arguing that the harassment is especially severe. This serves only to underscore Chief Judge Posner's thesis in *Jansen* that the *Restatement* is not a good framework for analyzing the law in this area.

Presumably recognizing that sexual harassment is normally outside the scope of a supervisor's employment, petitioner relies instead on *Restatement* § 219(2)(d)[7] to argue

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> present, A, although knowing that there is an ordinance against using dynamite near the highway, unnecessarily uses it to blast the rock, taking no precautions to guard travelers upon the road. If blasting is an abnormal and unexpectable method of executing the work for which A was employed, the blasting is not within the scope of employment.

Restatement § 231, illus. 1-2.

[7] Section 219(2)(d) of the *Restatement* provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . .
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence

that "[a]n employer is liable for the sexually hostile environment created by a supervisor . . . , regardless of whether it knew or should have known of that behavior, if the supervisor was 'aided in' perpetrating the harassment by the 'existence' of the powers he possesses as a supervisor." (Pet. Br. 21.)[8] According to petitioner, this standard requires a factual determination "in light of the record in each specific case." (*Id.*)[9]

As a practical matter, petitioner's argument runs afoul of *Meritor*'s holding rejecting an across-the-board strict

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of the agency relation.

[8] The Solicitor General also relies on this argument. (SG Br. 17-18.)

[9] Petitioner asserts that "[w]hether [a] supervisor is abusing [his] power is a fact-intensive inquiry." (Pet. Br. 19.) Thus, under petitioner's proposed standard, far fewer sexual harassment cases could be resolved by summary judgment.

According to one of petitioner's *amici*, the EEOC received 15,889 sexual harassment complaints in fiscal year 1997. (NELA Br. 21-22.) As Judge Coffey pointed out in *Jansen*, the number of employment cases filed in federal court has recently more than doubled (from 10,771 in 1992 to 23,152 in 1996). 123 F.3d at 540. Under petitioner's standard, many more of those cases would also have to be tried, exacerbating the existing problem "of having enough judicial manpower to adjudicate the incoming cases." Keynote Address of Chief Justice William H. Rehnquist, Symposium: The Future of the Federal Courts (Apr. 9, 1996), *reprinted in* 46 Am. U. L. Rev. 263, 270 (1996).

liability rule, because a supervisor almost always "will have been aided in some way in committing the tort by the position that he holds." *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J. concurring); *accord Jansen*, 123 F.3d at 563 (Manion, J., concurring and dissenting) (under the approach advocated by petitioner, "an employer nearly always is liable because the powers it bestows upon a supervisor 'enable' and 'help' him to harass a subordinate"). As a counterexample, petitioner posits that "anonymous harassment perpetrated by a supervisor is less likely to be aided by fear of supervisory power, since the victim could not be certain the perpetrator was in fact a supervisor." (Pet Br. 22 n.19.) Assuming such a thing as "anonymous harassment" actually exists in the real world, it is presumably extremely rare. Thus, petitioner's hypothetical scenario serves only to emphasize that her suggested standard is essentially equivalent to the strict liability rule the Court eschewed in *Meritor*.

Indeed, section 219(2)(d) of the *Restatement* was simply not designed to address torts like those at issue here. Section 219(2)(d) states a general rule of agency law, and subsequent sections of the *Restatement* set forth specific applications of that rule. The drafters' comments explain:

> Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. See §§ 247-249. Apparent authority may also be the basis of an action of deceit (§§ 257-264), and even physical harm. See §§ 265-267. In other situations, the servant may be able to cause harm because of his position as an agent, as where a telegraph

> operator sends false messages purporting to come from third persons. See § 261. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position. See § 222.

Restatement § 219, comment *e*. With the possible exception of the sections addressing physical harm, those provisions of the *Restatement* are not even superficially analogous to the issue presented in this case. And a close examination reveals that even the "physical harm" sections were intended to address a very different type of situation. For example:

> P, a taxicab company, purporting to be the master of the drivers of the cabs, in fact enters into an arrangement with the drivers by which the drivers operate independently. A driver negligently injures T, a passenger, and also B, a person upon the street. P is not liable to B. If it is found that T relied upon P as one furnishing safe drivers, P is subject to liability to T in an action of tort.

Restatement § 267, illus. 1. In short, the comments to *Restatement* § 219(2)(d) suggest that the provision applies only when the employee causes harm *because* of his position as an agent. *See* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229, 1249-50 (1991). Accordingly, it is simply inapplicable to the vast majority of hostile environment sexual harassment cases.

Likewise, *Restatement* concepts of "apparent authority" do not fit well into sexual harassment cases. The *Restatement* provides:

> [A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Restatement § 27. The drafters' comments emphasize that "[f]or apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person." *Id.* § 27, comment *a*. "[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* That test will almost never be satisfied if it is applied in the manner intended by the drafters of the *Restatement*, because, as discussed previously, everyone recognizes that "[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997), *petition for cert. filed*, No. 97-232 (quoting, *inter alia*, *Hicks v. Gates Rubber Co.*, 833 F.2d at 1417-18); *accord Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d at 261 ("illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment"). The general public — including both employers and employees — is aware that sexual harassment is against the law. Thus, in most cases, an alleged victim's credibility would be seriously jeopardized if she testified that she believed her employer *intended* to give a supervisor authority to commit sexual harassment. *See Jansen*, 123 F.3d at 563 (Manion, J., concurring and dissenting). There is no doubt that the employer should be held responsible in a rare case where such an intent was proven, but there is no need to resort to the common law of agency to reach that result.

Instead, the employer in such a case should be held liable on the ground that it knew or should have known of the harassment but failed to take prompt remedial action.

As reflected by the conflict in the lower courts, the *Restatement*, depending on the section chosen and the interpretation given it, can support virtually any result on a particular set of facts. Petitioner's *amici*, in fact, provide a vivid example of this phenomenon. The Solicitor General states unequivocally that "an agent's knowledge that he is personally engaged in wrongdoing may not be imputed to the employer." (SG Br. 28 n.5, *citing Restatement* § 280.) At least two other *amici*, however, cite section 496 of the *Restatement* for the opposite proposition. (NELA Br. 18; Lawyers' Comm. Br. 26-27.) Thus, while the *Meritor* Court instructed that the courts should look to agency principles for "guidance" in this area, 477 U.S. at 72, if courts are allowed to pick and choose among various provisions of the *Restatement* for those agency principles, the "guidance" provided is, in reality, no guidance at all.

II. AN EMPLOYER'S LIABILITY FOR A SUPERVISOR'S HOSTILE ENVIRONMENT SEXUAL HARASSMENT SHOULD BE BASED ON COMMON LAW AGENCY PRINCIPLES APPLIED TO TRADITIONAL NEGLIGENCE

There is no dispute that a cause of action for sexual harassment is essentially a tort claim. In *Meritor*, the Court used the language of tort law in discussing whether an employer can be held "absolutely liable," or whether it can be held liable only if it "knew or should have known" of the harassment. 477 U.S. at 63. And again in *Harris*, in defining the scope of a cause of action for sexual harassment, the Court looked to the tort law concept of the "reasonable person." 510

U.S. at 21. The Court has also used tort-based doctrines in other contexts in interpreting Title VII. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring) ("where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff's injury"). A number of lower courts have expressly recognized, moreover, that "Title VII . . . define[s] wrongs that are a type of tort, for which an employer may be liable." *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979); *accord Costle*, 561 F.2d at 995 (MacKinnon, J., concurring) ("sexual harassment . . . would constitute a tort"). Indeed, in practice, plaintiffs frequently bring pendent state law tort claims against employers and individual supervisors and co-workers in addition to Title VII sexual harassment claims — as petitioner did in this case. (Pet. App. 4a.)

Because the *Restatement* does not provide a workable solution to the employer liability question, the Court should look to the agency principles applicable in tort cases,[10] as

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[10] Although there is no general federal common law of torts, the Court frequently applies common law tort principles in particular areas of the law. For example, the Court recently reaffirmed that it has a "duty 'in interpreting [the Federal Employers' Liability Act] . . . to develop a federal common law of negligence . . . informed by reference to the evolving common law." *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 2113, 2117 (1997) (quoting *Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532, 558 (1994) (Souter, J., concurring)). Likewise, in admiralty cases, the Court regularly resorts to the common law of torts. *See, e.g., Saratoga Fishing Co. v. J.M. Martinac & Co.*, 117 S. Ct. 1783 (1997). *See also Heck v.*

informed by the objectives of Title VII. In particular, the Court should consider the objectives of Title VII specifically applicable to sexual harassment.

As originally enacted, Title VII was designed to eliminate discrimination in employment. *See* H.R. Rep. No. 914, 88th Cong., 2d Sess. 2401 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401. In 1991, Congress revised Title VII "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination. H.R. Rep. No. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. Thus, Congress had dual objectives for Title VII: effective deterrence and compensation for harm.

In sexual harassment cases, however, the emphasis should be on deterrence. Unlike many torts, hostile environment sexual harassment "does not usually bring about a significant change in the victim's wealth." *Jansen*, 123 F.3d at 510 (Posner, C.J., concurring and dissenting). Thus, even an award of damages in these cases is typically a mechanism for deterring future incidents of harassment, rather than a tool for compensating financial harm. Accordingly, the standard for employer liability in these cases should be one that focuses primarily on deterrence. As Chief Judge Posner noted in *Jansen*, "[t]here is no novelty in grounding principles of agency on deterrence." *Id.*

As discussed above, it is settled that employers are not to be held to a strict liability standard in all cases of supervisory harassment. *Meritor*, 477 U.S. at 72. Nor is such a standard

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Humphrey, 512 U.S. 477, 483 (1994) (applying the common law of torts in analyzing claims under 42 U.S.C. § 1983).

appropriate to deter sexual harassment by supervisors. In many cases, there is no reasonable measure that the employer could have taken to prevent the harassment. If the law nevertheless imposes liability in those cases:

> the *only* effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability — by definition because, were the costs less than the expected liability, the failure to incur them would be negligence; it is only when they are greater, so that the employer would not be negligent for failing to incur them, that strict liability bites.

Jansen, 123 F.3d at 511 (Posner, C.J., concurring and dissenting) (emphasis in original). In short, "[s]ometimes the incremental contribution of strict liability to deterrence is nil or slight, and easily outweighed by the additional costs of a more expansive liability." *Id.*

As the Solicitor General points out, there is a consensus among the lower courts that an employer is liable for hostile environment harassment by a non-supervisory co-worker only if "the employer knew or should have known of the harassment and failed to take appropriate corrective action." (SG Br. 17) (citing cases).[11/] He contends, however, that a different

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[11/] The Solicitor General also notes that the lower courts have generally construed the Court's comments in *Meritor* to mandate a strict liability standard in all cases involving quid pro quo sexual harassment. (SG Br. 15-16 (citing

standard should apply to supervisors, i.e., that an employer may sometimes be absolutely liable for supervisory harassment, while an employer's liability for co-worker harassment turns solely on whether the employer is "negligent or reckless." (SG Br. 17.) Although the Solicitor General derives this standard (for co-worker harassment) from the *Restatement* — in particular, section 219(2)(b) — it is essentially a tort law standard. And it is this tort law standard that should also apply in determining employer liability for supervisory sexual harassment.

Negligence has been described as "conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts* § 31, at 169 (5th ed. 1984) (quoting *Restatement (Second) of Torts* § 282.) "[T]he essence of negligence is not necessarily the absence of solicitude for those who may be adversely affected by one's actions but is instead behavior which should be recognized as involving unreasonable danger to others." *Id.* "It thus is fundamental that the standard of conduct which is the basis of the law of negligence is usually determined upon a risk-benefit form of analysis: by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent

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cases)). Although the appropriate standard for imposing liability on an employer in a quid pro quo case is not at issue in this case, the Chamber believes that, by applying a strict liability standard in every such case, the lower courts have misinterpreted the Court's comments in *Meritor*. *See Jansen*, 123 F.3d at 519 (Coffey, J., concurring and dissenting) (strict liability standard is contrary to Court's decision in *Meritor* and at odds with the "agency principles" that the Court has instructed courts to consider in Title VII cases).

of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." *Id.* at 173.

The Solicitor General's justification for adopting a different rule for supervisors is based on supervisors' purported "authority" under agency law. But that begs the question: authority to do what? Supervisors typically have authority to assign work to their subordinates, to evaluate their performance, and sometimes to hire and fire them. As discussed above, however, supervisors rarely have actual or apparent authority to sexually harass their subordinates. *See supra* at 13. To be sure, supervisors may have more opportunities to perpetrate sexual harassment, and in appropriate cases, it may be appropriate for the finder of fact to take that phenomenon into account in evaluating whether the employer was negligent in failing to prevent the harassment. However, the basic negligence standard of liability should be the same for all hostile environment sexual harassment. Regardless of whether the harasser is a supervisor or a co-worker, the employer should be held liable if and only if it knew or should have known of the harassment but failed to take prompt remedial action.

The approach advocated by the petitioner and the Solicitor General ignores the maxim that "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253. "Strict liability or 'liability without fault' is the exception rather than the norm in Anglo-American tort law." *Jansen*, 123 F.3d at 521 (Coffey, J., concurring and dissenting) (emphasis omitted). Traditional tort law holds defendants to a negligence standard unless there is some extraordinary reason to impose strict liability. "Policy decisions of this magnitude have traditionally been left to the legislative branch of government, and should remain the

province of the people's elected representatives. In fact, Congress has not even *addressed* the issue of an employer's liability for sexual harassment, much less indicated that employers should be held strictly liable under a 'cost-shifting' theory." *Id.* at 522 (emphasis in original). *See also id.* at 518 ("A strict liability standard, in contrast with the more flexible and reasonable negligence standard, [would] preclude [courts] from accounting for 'the circumstances of [each] particular case,' including the disparate corporate structures of modern business.") (citation omitted).

Although courts will be required to evaluate on a case-by-case basis whether an employer has been negligent, a number of relevant concepts have already evolved in the lower courts. An employer is deemed to have knowledge of sexual harassment — and thus be liable for negligence if it fails to take action — if the victim complains to upper-level management. *See, e.g., Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989). The employer may also be deemed to have knowledge if there have been previous complaints of harassment by the supervisor in question. *See, e.g., Bouton*, 29 F.3d at 107; *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *vacated and remanded on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc). And where the harassment is sufficiently severe and pervasive, the employer may be deemed to have constructive knowledge. *E.g., Meritor*, 477 U.S. at 72 (noting that the trial court had yet to determine whether the supervisor's harassment was so pervasive and continuous that the employer must have become conscious of it); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

An employer with actual or constructive knowledge can nevertheless avoid liability for negligence if it takes prompt corrective action. *See, e.g., Dennis v. County of Farifax*, 55 F.3d 151, 155 (4th Cir. 1995). At a minimum, the employer

must investigate the complaint, *e.g., Carmon v. Lubrizol Corp.*, 17 F.3d 791, 794-95 (5th Cir. 1994), and if it finds that the complaint is meritorious, should mete out discipline to the supervisor that is commensurate with the severity of the misconduct. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991).

Finally, the Court's decision in *Meritor* instructs that it is important for an employer to adopt an antiharassment policy. In that case, the Court rejected an argument that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [an employee's] failure to invoke that procedure, must insulate [the employer] from liability." 477 U.S. at 72. But in *Meritor*, the employer's "general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. Moreover, the [employer's] grievance procedure apparently required an employee to complain first to her supervisor . . . ." *Id.* at 72-73 (citation omitted). "Since [the plaintiff's supervisor] was the alleged perpetrator, it [was] not altogether surprising that [the plaintiff] failed to invoke the procedure and report her grievance to him." *Id.* at 73. The Court emphasized that the employer's "contention that [the employee's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.*

In the instant case, the City had adopted a written policy expressly prohibiting sexual harassment in the workplace. (JA 269-272.) The policy provided that "[a]ny employee who believes he or she has been the subject of sexual harassment should report the alleged act immediately to his or her department supervisor, department or division head or the Personnel & Labor Relations Director." (JA 271.) Indeed, the

policy further provided that complaints against supervisors should be "filed directly with the Personnel & Labor relations director or representative." (*Id.*) Furthermore, the policy required a prompt, confidential investigation, and stated that if a violation is found, "prompt attention and disciplinary action designed to stop the harassment immediately and to prevent its recurrence will be taken." (*Id.*)

Petitioner worked for the City from September 1985 through June 1990, but she never filed a complaint with the personnel department. (Pet. App. 2a-3a.)[12/] In April 1990, another former lifeguard wrote a letter to the personnel department complaining that Bill Terry and David Silverman had sexually harassed the female lifeguards. (Pet. App. 4a.) The City promptly investigated the complaint, determined it to be valid, and disciplined both men. (*Id.*) Under these circumstances, petitioner did not establish that the City was negligent, i.e., that it "knew or should have known" of the harassment prior to April 1990.[13/]

[12/] Petitioner did complain to another supervisory lifeguard. However, that supervisor was an immediate subordinate of one of the men who was harassing petitioner. (Pet. App. 3a.) Thus, as one might expect, this course of action was just as futile as complaining to one of the perpetrators themselves. By contrast, the City's procedures — which petitioner did not invoke — were designed to encourage sexual harassment victims to lodge complaints with persons who could and would redress their grievances.

[13/] Although there was "some evidence that the City did not effectively disseminate" its sexual harassment policy to its lifeguard staff, (Pet. App. 17a n.11), the court of appeals concluded that the "failure to disseminate this policy was not

Most responsible American employers have heeded *Meritor*'s admonition, and have adopted strong policies against sexual harassment. Such policies dispel any notion that supervisors or other co-workers have either "actual authority" or "apparent authority" to commit sexual harassment. Likewise, such policies provide a mechanism for employers to learn that sexual harassment is taking place, so that they may take appropriate remedial action. "[W]ith rights should come responsibilities, including . . . the responsibility [to use] the procedures spelled out in the company's published policy against sexual harassment." *Jansen*, 123 F.3d at 547 (Coffey, J., concurring and dissenting). *See also Gary*, 59 F.3d at 1398 ("when . . . an employer has taken energetic measures to discourage sexual harassment in the workplace and has established, advertised, and enforced effective procedures to deal with it when it does occur, it must be absolved of Title VII liability under a hostile work environment theory of sexual harassment").

Contrary to the theme that permeates the briefs of petitioner and her *amici*, the vast majority of America's employers do not condone or tolerate sexual harassment, nor do they retaliate against employees who complain about this pernicious problem. Most employers, in fact, are dedicated to preventing sexual harassment, because doing so is both morally and financially responsible. Doing otherwise would not only subject them to liability, it would make it far more difficult to hire and retain good employees.

The Court should adopt a rule of law that imposes liability only on employers who fail to exercise due care in

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the reason why the City did not know about the harassment." (*Id.*)

adopting and implementing policies reasonably designed to eradicate sexual harassment from the workplace. "If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the *only* effect of the law will be to impose extra costs," with no corresponding benefits. *Jansen*, 123 F.3d at 511 (Posner, C.J., concurring and dissenting) (emphasis in original).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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